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ESTATES ON CONDITION.

§ 1. NATURE AND CLASSIFICATION OF CONDITIONS—PRECEDENT AND SUBSEQUENT.—The words *precedent* and *subsequent,* as applied to conditions annexed to estates in land, have reference to the time when the estate vests. When the condition is precedent, the estate cannot vest until the condition is performed; when the condition is subsequent, the estate vests at once, but it is liable to be divested if the condition is not performed. In the one case the performance of the condition must precede the vesting of the estate, and the condition is therefore called precedent; in the other the non-performance of the condition follows the vesting of the estate, and the condition is therefore called subsequent.

It will be seen that a condition precedent is in its nature *creative,* since at the time of the grant no estate vests in the intended beneficiary. The conveyance is as yet inchoate, but on the happening of a certain event, or the performance of a certain act, the estate arises and takes effect in the grantee. On the other hand, the condition subsequent is in its nature *destructive.* Under such a condition, the estate is already vested in the grantee, but on the happening of a certain event (perhaps some default on his part) the estate may, at the will of the grantor, be divested and destroyed.

The distinction between conditions precedent and subsequent is thus stated by Magruder, C. J., in Star Brewery Co. *v.* Primas:[1] "A precedent condition is one which must take place

[1] 163 Ill. 652, 45 N. E. 145.

before the estate can vest or be enlarged; and if land is conveyed upon a precedent condition, the title will not pass until the condition is performed. A subsequent condition is one which operates upon an estate already created and vested, and renders it liable to be defeated. A deed upon condition subsequent conveys the fee when it is executed, but the fee passes subject to the contingency of being defeated as provided in the condition, the grantor having the power of reëntry upon condition broken; and if there is a breach of the condition, the estate continues in the grantee until defeated by actual entry. Whether a condition is precedent or subsequent depends on the intention of the parties." [2]

§ 2. CONDITIONS PRECEDENT AND SUBSEQUENT; HOW DISTINGUISHED.—In Finlay *v.* King,[3] it is said by Marshall, C. J. (at p. 374): "It was admitted in argument, and is certainly well settled, that there are no technical and appropriate words which always determine whether a devise be on a condition precedent or subsequent. The same words have been determined differently; and the question is always a question of intention. If the language of the particular clause, or of the whole will, shows that the act on which the estate depends must be performed before the estate can vest, the condition is of course precedent; and unless it is performed, the devisee can take nothing. If, on the contrary, the act does not necessarily precede the vesting of the estate, but may accompany or follow it, if this may be collected from the whole will, the condition is subsequent."

The law as thus laid down has met with general approval, and is applicable to a deed as well as to a devise.[4]

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[2] 2 Tho. Coke, 1, n. A.; 2 Bl. Com. (154); 1 Shepp. Touchstone (117); 1 Prest. Estates (41); 2 Tuck. Com. (88); 1 Lomax Dig. (262); 2 Min. Ins. (4th ed.), 265-6; 6 Am. & Eng. Ency. Law (2d ed.), 500; Cross *v.* Carson (Ind.) 44 Am. Dec. 742, and note; Raley *v.* Umatilla County, 15 Or. 172, 3 Am. St. Rep. 142; Ecroyd *v.* Coggeshall (R. I.), 79 Am. St. Rep. 741, and note; Lewis *v.* Henry, 28 Gratt. 192, 200.

[3] 3 Pet. 346.

[4] Nicoll *v.* New York, &c., R. Co., 12 N. Y. 121; Bell County *v.* Alexander, 22 Texas 350, 73 Am. Dec. 268; In re Stickney's Will, 85 Md. 79, 60 Am. St. Rep. 308; Markham *v.* Hufford (Mich.), 82 N. W. 222, 48

Two examples will illustrate the reasoning by which a condition may be found subsequent in order to effectuate intent.

In Nicoll *v.* New York, &c., R. Co.,[5] it is said (after adopting the test in Finlay *v.* King, supra): "In this case it was evidently the design of the parties that the estate should vest at once, so that the grantee might proceed immediately with the construction of the road; otherwise a condition that it should be completed within a given time, or ever completed, would be impossible. From the character of the condition it could not be a condition precedent. Possession and control of the land must necessarily accompany the construction and precede the completion of the road. The grant is not made to take effect on the happening of a certain event, but *in præsenti,* and liable to be divested by the grantee's failure to perform the condition."

In Morse *v.* Hayden,[6] it is said: "Conditions have no idiom. Whether precedent or subsequent is a question purely of intention to be gathered from the whole language adopted. Such conditions of support and maintenance in wills ["on condition that my wife (the devisee) shall provide and maintain our son until he shall attain his majority"], without any language charging the property with the performance of the conditions, or in deeds conveying farms, would seem to be conditions subsequent because of the implication that the devisees or grantees are to have possession and control of the premises for the purpose of fulfilling the conditions." [7]

It may be added that a condition precedent enters into the very limitation of an estate, which it renders contingent, whereas, a condition subsequent is superimposed upon a previous limitation, which it renders defeasible. Thus whether a remainder is vested or contingent may depend on whether a condition is precedent or subsequent, and this will depend upon whether the condition is "incorporated into the gift to or de-

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L. R. A. 580; Alexander *v.* Alexander (Mo.), 57 S. W. 110; Lewis *v.* Henry, 28 Gratt. 202; Burdis *v.* Burdis, 96 Va. 81, 70 Am. St. Rep. 824; Jones *v.* Chesapeake, &c., R. Co., 14 W. Va. 523; Reuff *v.* Coleman, 30 W. Va. 171.

[5] 12 N. Y. 121. [6] 82 Me. 227, 19 Atl. 442.

[7] Lewis *v.* Lewis (Conn.), 51 Atl. 854.

scription of the remainderman, or is added as a separate clause after words which have already given a vested interest." [8] And see New Orleans *v.* Texas, &c., R. Co.[9] where it is said that the *suspensive* condition under the Louisiana Code is the equivalent of the condition precedent of common law.

§ 3. CONDITION PRECEDENT OR SUBSEQUENT; WHICH FAVORED IN LAW.—Here it is necessary to make a discrimination.

1. *In deciding whether the condition is precedent or subsequent.*

It is a maxim that the law favors the vesting of estates, in order that the land may not be "in a state of contingency." Hence when the question is whether certain words in a grant or devise create a condition precedent or subsequent, the law leans to the latter construction; and the estate is deemed, if possible, to be vested in the grantee or devisee immediately, subject to be divested by the breach of the condition. A similar doctrine is applicable to remainders, and in doubtful cases they are construed as vested rather than contingent. And the law is the same as to legacies.[10]

2. *In dealing with the condition, after its character as precedent or subsequent has been ascertained.* In dealing with a condition *precedent,* when ascertained to exist, the law may be said to favor the condition, inasmuch as it must be punctually and precisely performed, or the contingent estate can never vest. And even if the condition be unlawful or impossible, yet, if precedent, the estate can never vest, as the contingency cannot arise, or the condition be lawfully performed.

[8] 20 Am. & Eng. Ency. Law. 850; Blanchard *v.* Blanchard, 1 Allen (Mass.) 223; Ducker *v.* Burnham, 146 Ill. 9, 37 Am. St. Rep. 135, 143.

[9] 171 U. S. 312, 334.

[10] See on the whole subject, Pennington *v.* Pennington, 70 Md. 418; In re Stickley's Will, 85 Md. 79, 60 Am. St. Rep. 308; Sellers *v.* Sellers, 88 Va. 380; Patton *v.* Ludington, 103 Wis. 629, 74 Am. St. Rep. 910; Blanchard *v.* Blanchard, 1 Allen (Mass.) 223; Chapman *v.* Chapman, 90 Va. 409; Crews *v.* Hatcher, 91 Va. 378; Vashon *v.* Vashon, 98 Va. 170; Major *v.* Major, 32 Gratt. 823; Jones *v.* Habersham, 107 U. S. 174; Ducker *v.* Burnham, 146 Ill. 9, 37 Am. St. Rep. 135; Eldred *v.* Meek, 183 Ill. 26, 75 Am. St. Rep. 86.

Nor will equity interpose, and grant relief for the non-performance of a condition precedent.[11]

But when the condition is found to be *subsequent,* the law then declares that the estate, already vested, shall, if possible, remain vested, *i. e.,* shall not be forfeited; and hence the doctrine that conditions subsequent, "as they go in destruction and defeasance of estates are odious in law, and shall be taken strictly." That is to say, the terms of a condition subsequent shall be construed strictly, against the grantor or devisor imposing it, in deciding what is required to be done or forborne by the grantee or devisee; and as to what is required, a *substantial* performance will suffice to save the estate, and only a substantial failure to perform will work a forfeiture. Maddox *v.* Adair.[12] And the disfavor in which conditions subsequent (as destroyers of estates) are held may be seen in the doctrine as to the persons to whom they may be reserved, and by whom they may be enforced; in the doctrine of equitable relief against forfeiture when compensation may be made; and in the fact that an impossible or illegal condition is void, and the grantee or devisee takes the estate free from the condition, the estate thus becoming absolute and indefeasible.[13]

§ 4. Words Proper for a Condition Subsequent.—We have seen that there are no technical words to distinguish between conditions precedent and conditions subsequent; and that the same words may indifferently make either, according to the intent of the person who creates the condition. But though

[11] Davis *v.* Gray, 16 Wall. 203, 229; Burdis *v.* Burdis, 96 Va. 81, 70 Am. St. Rep. 825.

[12] 66 S. W. (Texas) 811.

[13] Jackson *v.* Schutz, 18 Johns 174, 9 Am. Dec. 195, and note at p. 202; Coppage *v.* Alexander, 2 B. Monroe, 313, 38 Am. Dec. 153, and note at p. 160; Cross *v.* Carson, 8 Black. (Ind.) 138, 44 Am. Dec. 742, and note at p. 744; Taylor *v.* Sutton, 15 Ga. 103, 60 Am. Dec. 682; Thompson *v.* Thompson, 9 Ind. 323, 68 Am. Dec. 638, 645; Emerson *v.* Simpson, 43 N. H. 475, 80 Am. Dec. 184; S. C., 82 Am. Dec. 168; Rawson *v.* School District, 7 Allen (Mass.) 125, 83 Am. Dec. 670; Kilpatrick *v.* Mayor of Baltimore, 81 Md. 179, 48 Am. St. Rep. 509; Faith *v.* Bowles, 86 Md. 13, 63 Am. St. Rep. 489; Lewis *v.* Henry, 28 Gratt. 192, 203; Burdis *v.* Burdis, 96 Va. 81, 70 Am. St. Rep. 825, and note.

words of contingency do not create a condition precedent, it does not follow that they create a condition subsequent. As is said by Morton, J., in Clapp *v.* Wilder: [14] "In numerous cases, for one reason or another, words apt to create a condition at common law in a deed have been interpreted as meaning something else—limitations, covenants, restrictions, easements, servitudes, trusts—because it was thought that such a construction would best conform to and carry out the intention of the parties."

While this is the case, and manifest intention may negative condition altogether, it is important to inquire what words are "apt to create a condition at common law," and have *prima facie,* at least that effect. It is to be noticed that in the discussion of these words the books invariably contemplate conditions subsequent, though the same words might in a proper case create a condition precedent.

It is laid down by Littleton [15] that the following words, "by virtue of themselves, without any more saying," make an estate upon condition [*i. e.,* upon condition subsequent], viz., "on condition" (*sub conditione*), "provided" (*proviso*), and "so that" (*ita quod*). But Littleton points out a diversity between the words aforesaid and other words of condition, such as "if it happen," etc. (*si contingat,* etc.): "For these words, *si contingat,* etc., are nought worth to such a condition unless it [*sic*] hath these words following, 'That it shall be lawful for the feoffor and his heirs to enter,' etc. But in the cases aforesaid it is not necessary by the law to put such clause, viz., that the feoffor and his heirs may enter, etc., because they may do this by force of the words aforesaid, for that they contain in themselves a condition, viz., that the feoffor and his heirs may enter, etc."

The same doctrine is laid down in Sheppard's Touchstone (p. 121) as follows: "Know, therefore, that for the most part conditions have conditional words in their frontispiece, and do begin therewith; and that amongst these words there are three words that are most proper, which in and of their own nature and efficacy, without any addition of other words of reëntry

[14] 176 Mass. 342.

[15] 2 Tho. Co. 4, 5.

in the conclusion of the condition, do make the estate conditional as *proviso, ita quod,* and *sub conditione.* . . . . But there are other words, as *si, si contingat,* and the like, that will make an estate conditional also; but then they must have other words joined with them, and added to them in the close of the condition; as that then the grantor shall reënter, or that then the estate shall be void, or the like." [16]

§ 5. CONDITION SUBSEQUENT DISTINGUISHED FROM A LIMITATION.—A condition subsequent must be distinguished from a limitation, which is not a condition at all, although it is called by Littleton a "condition in law." 2 Tho. Co. (120). The only resemblance between a condition subsequent and a limitation is that each may so operate as to put an end to an estate; but the mode of operation is entirely different. "A limitation will necessarily determine the estate; a condition may defeat an estate." [17] As this subject has been rendered obscure by Littleton's unfortunate nomenclature, it may be well to go into it at some length.

Upon every grant of an estate there is a limitation, express or implied, in order to mark out and define the measure of the estate, *i. e.,* the length of time it is to continue. Accordingly, certain words used for this purpose are called *words of limitation, e. g.,* "heirs," "heirs of the body," etc. Now if an estate is granted to A for 21 years, or to A for life, or to A and the heirs of his body, and nothing more is said, it is clear that there is a limitation, and a limitation only; and it could hardly be imagined that the fact that the estate is to end when the years elapse, or the grantee dies, or dies without issue, constitutes these events conditions, as if the grantor should say, "I give you the land for life, on condition you do not die!" There is no condition. The estate for life is given *until the grantee's death;* and when that event happens, it *expires by limitation.*

[16] In accord with the law as thus laid down by Littleton and in the Touchstone, see 2 Min. Ins. (4th ed.) 492; 6 Am. & Eng. Ency. Law (2d ed.) 501, note; Rawson *v.* School District, 7 Allen (Mass.) 125, 83 Am. Dec. 670; Brown *v.* Caldwell, 23 W. Va. 187; Raley *v.* Umatilla County, 15 Or. 142, 3 Am. St. Rep. 142; Clapp *v.* Wilder, 176 Mass. 332; Papst *v.* Hamilton (Cal.), 66 Pac. 10.

[17] 1 Shepp. Touch. (117) by Preston.

To constitute a condition subsequent, there must be something added to the limitation, "a distinct clause," whose office is "to defeat the estate [already limited] on some event which may happen, or on some act to be done, before the estate has filled the utmost measure or time appointed for its continuance." * Here the estate granted has not filled out the measure of its *limitation* when the *condition* is broken; and for such breach the grantor may enter and divest the estate, which does not end by limitation, but is destroyed by the enforcement of a forfeiture. The grantor may waive the forfeiture, and then the estate will continue as limited. But when the period of *limitation* has passed, the estate ends of itself and without entry. Indeed, it *cannot* continue longer, even if the grantor wishes it, for there is nothing to continue.[18]

§ 6. MARRIAGE AS A LIMITATION OR CONDITION SUBSEQUENT.—It will conduce to clearness to illustrate the difference between a limitation and a condition by the not uncommon case of a gift to a widow dependent on her not marrying again. Let us suppose first that land is given a widow while she remains unmarried (*durante viduitate*): is this a limitation or a condition? And if she marries, does she forfeit the estate, or does it expire by limitation? It is not difficult to see that it is a limitation merely, without the semblance of a condition. How long is the land given the widow? While she remains unmarried, or what is the same thing, until she marries. Nothing is said about her life; it is not limited until her death, but until her marriage. When, therefore, she marries, she has enjoyed all the estate that was given her, and cannot complain that she has lost anything by forfeiture; the land was given her until her marriage, and on that event, the estate ends by limitation. And while the estate might have continued until the widow's death, if she had remained unmarried, yet it is not true that on her marriage a larger estate limited is thereby cut short

* 1 Shepp. Touch. (117).

[18] 1 Preston, Estates (45); 2 Tho. Co. (87) n. (L. 2); 2 Bl. Com. 155; Millan *v.* Kephart, 18 Gratt. 1, 7; Smith *v.* Smith, 23 Wisc. 176, 99 Am. Dec. 153; Atlanta, &c., R. Co. *v.* Jackson, 108 Ga. 634, 34 S. E. 184.

and defeated. The estate is until her marriage, and when that takes place, whether sooner or later, the entire estate given has been enjoyed, and is at an end without entry by the grantor.

But suppose land is given to a widow for life, with a condition superadded that she shall not marry; and with a proviso that if she does marry, the grantor may enter upon the land immediately, and resume possession. Here the limitation is for life, which is equal to until death. But this is not all. There is superadded or imposed on the limitation a condition, viz., that the widow shall not marry. Suppose, however, she does marry, what is the result? Will her estate, in case the grantor enforces the condition and takes the land from her, end by limitation? Clearly not, for the estate limited was for her life, and would not end by limitation until her death; whereas her estate is divested and ends on her marriage—perhaps many years before her death. Hence the estate has died a violent death; the estate limited to the widow was larger than that which she has enjoyed; the entry of the grantor cuts it short before the time limited. The widow forfeits for breach of condition.

It may be objected that in the two cases just put the practical effect is the same, whether we regard the language as importing a limitation or a condition; that in either case, if the widow does not marry, her estate continues until her death; while if she does marry, her estate is at an end. But there is an important difference. If the land is given to the widow until she marries, the effect of her marriage is to terminate her estate *ipso facto,* and immediately. No entry by the grantor is required in order to terminate her estate. If the widow remains in possession, it is as tenant by sufferance, or by virtue of some new estate given her by the grantor. When, however, the land is given to the widow for life on condition that she does not marry, the effect of her marriage is not to end her estate *ipso facto;* for a life estate was given her, and that does not expire by limitation on marriage. The grantor must reënter and take the land, or the widow will remain in possession by virtue of her old estate. In other words, she is liable to forfeit the life estate on her marriage, but if the grantor waives the forfeiture

(as he may) the life estate continues to its natural termination.[19]

§ 7. COLLATERAL LIMITATION.—We have seen the nature of a simple limitation, and how it differs from a limitation with a condition subsequent imposed on it. Let us now consider a *collateral* limitation. In 1 Preston on Estates (42) it is said:

"A direct limitation marks the duration of an estate by the life of a person, or by the continuance of heirs, or by a space of precise and measured time; making the death of the person in the first example, the continuance of heirs in the second example, and the length of the given space in the third example, the boundary of the estate or the period of duration. A collateral limitation, at the same time that it gives an interest which may have continuance for one of the times in a direct limitation, may on some event which it describes put an end to the right of enjoyment during the continuance of that time."

In Millan *v.* Kephart,[20] it is said by Joynes, J.: "A collateral limitation marks an event which may happen within the time described in the direct limitation; and on the happening of that event puts an end to the estate. Thus a lease 'To A for 20 years or until B shall return from Rome' may cease and determine either by the expiration of twenty years, the time marked for its duration by the direct limitation, or by the happening within that time of the event described in the collateral limitation, to-wit, the return from Rome. In either case the estate of the tenant will have reached the utmost bounds marked for its continuance by the limitation by which its duration is governed; and so, in either case, the right of the tenant will be absolutely at an end without entry or other act on the part of the landlord."

Again, suppose land is granted to a widow "until her death

[19] Coppage *v.* Alexander, 2 B. Monroe, 313, 38 Am. Dec. 153; Little *v.* Birdwell, 21 Tex. 597, 73 Am. Dec. 242; Bostick *v.* Blades, 59 Md. 231, 43 Am. Rep. 548; Mann *v.* Jackson, 84 Me. 400, 24 Atl. 886; Gillespie *v.* Allison, 117 N. C. 512, 20 S. E. 627; Dubois *v.* Van Valen (N. J.) 48 Atl. 241; Shaw *v.* Shaw (Ia.), 68 N. W. 327; Chenault *v.* Scott (Ky.), 66 S. W. 759

[20] 18 Gratt. 1.

or marriage." Here the grantor has chosen two events as alternative limitations, on the happening of either of which the estate given immediately determines. The limitation *until death* is the longer or direct limitation; that *until marriage* is the shorter or collateral limitation, since by it the widow's estate may end during her life. But her marriage cannot be regarded as a cause of forfeiture. That event is embodied in the limitation itself, as part of it, and does not follow the limitation for life "as a distinct clause," to defeat the larger estate granted. Hence it results that no more on the marriage than the death of the widow is entry by the grantor necessary to terminate her estate; for on either event it ends of itself, by limitation.

Thus in Coppage *v.* Alexander,[21] the devise was: "I give unto my beloved wife, Mary Alexander, the half of my land I now own during her widowhood or life;" and it was held that this should be construed "as a limitation expressive of the duration of the estate, and not as a condition subsequent." The court said: "The happening of either event was intended to terminate the estate. It was intended as a benefit *durante viduitate* and no longer. The estate was not vested for life, to be forfeited if she married; but is vested during her widowhood only, in the event of her marriage, and must cease with the termination of her widowhood, as one of the periods to which it was limited, and upon the accrual of which it was made to expire." [22]

§ 8. Collateral Limitation by Way of a Base Fee.— For an explanation of a base or determinable fee, see 2 Bl. Com. (109). In 2 Bl. Com. (154), base fees are classed with estates on condition subsequent, but this is a mistake. A base fee is a fee determinable on a contingent event. The estate is limited in fee or *until the event;* and on the happening of the event it ends *instanter,* and no entry of the grantor is necessary in order to terminate it. The event is therefore in the nature of a *limitation* of the estate, and not a condition subsequent.[23]

[21] 2 B. Mon. (Ky.) 313, 38 Am. Dec. 153.

[22] Pearse *v.* Owens, 3 N. C. 415, 2 Hayw. 234.

[23] 1 Prest. Est. (126), (442); Union Canal Co. *v.* Young, 1 Whart.

The grantor of a base fee while the event remains contingent has no reversion in the land granted, but only a *possibility of reverter, i. e.,* a chance to get back the estate if the event does happen at any future time. And in Gray's *Rule against Perpetuities,* §§ 31-42, it is contended that since the statute of *Quia Emptores,* abolishing tenure between feoffor and feoffee on a grant of the fee-simple, possibilities of reverter are not valid interests in land, and that by virtue of that statute base fees have ceased to exist. But in the United States base fees are not considered as dependent on the existence of tenure, and are still recognized as valid estates, as Prof. Gray concedes and laments.

In First Universalist Society *v.* Boland,[24] it is said: "A question or doubt, however, has arisen, though not urged by counsel in this case, whether after all there is now any such estate as a qualified or determinable fee, or whether this form of estate was done away with by the statute of *Quia Emptores.* See Gray, *Rule against Perpetuities,* §§ 31-40, where the question is discussed and authorities are cited. We have considered this question; and whatever may be the true solution of it in England, where the doctrine of tenure still has some significance, we think the existence of such an estate as a qualified or determinable fee must be recognized in this country, and such is the general consensus of opinion of courts and text-writers." Many authorities are cited by the court (p. 175).

Prof. Gray also argues (*Rule against Perpetuities,* § 312) that such possibilities of reverter, if allowed, would violate the rule against perpetuities, as the reverter might not take place within lives in being and 21 years thereafter. But this objection has not been allowed in the United States. See First Universalist Society *v.* Boland, *supra,* where it is said (at p. 175):

(Pa.) 410, 30 Am. Dec. 212; Leonard *v.* Burr, 18 N. Y. 96; Smith *v.* Smith, 23 Wisc. 176, 99 Am. Dec. 153; Henderson *v.* Hunter, 59 Pa. St. 335; United States Pipe Line Co. *v.* Delaware, &c., R. Co., 62 N. J. Law, 254, 41 Atl. 759, 42 L. R. A., 572; Atlanta, &c., R. Co. *v.* Jackson, 108 Ga. 634, 34 S. E. 184. And see Bolling *v.* Petersburg, 8 Leigh (Va.) 224, 234.

[24] 155 Mass. 171.

"Clark's possibility of reverter [after a base fee] is not invalid for remoteness. It has been expressly held by this court that such possibility of reverter upon a breach of a condition subsequent is not within the rule against perpetuities.[25] If there is any distinction in this respect between such possibility of reverter and that which arises on the determination of a qualified fee, it would seem to be in favor of the latter. But they should be governed by the same rule. If one is not held void for remoteness the other should not be. The very many cases cited in Gray, *Rule against Perpetuities,* §§ 305-312, show conclusively that the general understanding of courts and the profession in America has been that the rule as to remoteness does not apply; though the learned author thinks this view erroneous on principle." [26]

For a recent case in which an estate was held to be a base fee, see Pettitt *v.* Stuttgart, etc., Institute.[27] For other cases in which reference is made to base fees, see Stuart *v.* Easton; [28] Noyes *v.* St. Louis, etc., R. Co.; [29] Hunter *v.* Murfee.[30]

§ 9. CONDITION SUBSEQUENT DISTINGUISHED FROM A COVENANT; COVENANT FAVORED.—In many cases words relied upon as creating a condition subsequent, and technically sufficient for that purpose, have, upon their true construction, been held to be contractual in their nature, imposing the obligation of a covenant, and not conditional, with liability to forfeiture. "A condition differs from a covenant. The legal responsibility of non-fulfilment of a covenant is that the party violating it must respond in damages. The consequence of the non-fulfilment of a condition is forfeiture of the estate. The grantor may reënter and possess himself of his former estate. This court [of equity], in a proper case, can enforce the specific performance of a covenant; but it cannot enforce the specific performance of

[25] Tobey *v.* Moore, 130 Mass. 448; French *v.* Old South Society, 106 Mass. 479.

[26] See note to Barnum *v.* Barnum (Md.), 90 Am. Dec. 103-4.

[27] 55 S. W. 485.

[28] 170 U. S. 394.

[29] 21 N. E. 487.

[30] 28 So. 9.

that in a deed the non-performance of which works a forfeiture of the estate." [31]

It is well settled that no particular words are necessary to create a covenant. In Sheppard's *Touchstone* (162) it is said: "and there needs not, in this case, formal and orderly words, as covenant, promise, and the like, to make a covenant on which to ground an action of covenant; for a covenant may be had by any other words; and upon any part of an agreement in writing [under seal], in what words soever it be set down for anything to be or not to be done, the party to or with whom the promise or agreement is made, may have this action [of covenant] upon the breach of the agreement." [32]

It has been seen that as conditions subsequent tend to destroy estates, they are not favored in law.[33] In Scovill *v.* McMahon,[34] it is said: "The law is well established that such conditions are not favored, and are created only by express terms or clear implication; that courts will always construe clauses in deeds as covenants rather than conditions, if they can reasonably do so; that if it is doubtful whether a clause in a deed imports a condition or a covenant, the latter construction will be adopted; and that though apt words for the creation of a condition are employed, yet, in the absence of an express provision for reëntry or forfeiture, the court, from the nature of the acts to be performed or prohibited by the language of the deed, from the relation and situation of the parties, and from the entire instrument, will determine the real intention of the parties." [35]

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[31] Woodruff *v.* Woodruff, 44 N. J. Eq. 349, 1 L. R. A. 380, and note; Post *v.* Weil, 115 N. Y. 361, 12 Am. St. Rep. 809, 818; Chicago, &c., R. Co. *v.* Titterington, 84 Texas, 218, 31 Am. St. Rep. 39, 42; Brown *v.* Chicago, &c., R. Co. (Iowa), 82 N. W. 1003.

[32] Hale *v.* Finch, 104 U. S. 261; Graves *v.* Deterling, 120 N. Y. 448, 457.

[33] Peden *v.* Chicago, &c., R. Co., 73 Iowa 378, 5 Am. St. Rep. 680; Kilpatrick *v.* Mayor of Baltimore, 81 Md. 179, 48 Am. St. Rep. 509.

[34] 62 Conn. 378, 36 Am. St. Rep. 350.

[35] Curtis *v.* Board of Education, 43 Kansas, 138, 23 Pac. 98; Greene *v.* O'Connor, 18 R. I. 56, 19 L. R. A. 262, and note; Elyton Land Co. *v.* South &c., R. Co., 100 Ala. 396, 14 So. 207; Faith *v.* Bowles, 86 Md. 13, 63 Am. St. Rep. 489; King *v.* Norfolk, &c., R. Co., 99 Va. 625; Lowman *v.* Crawford, 99 Va. 689; Shreve *v.* Norfolk, &c., R. Co., 109 Va. 706.

But although no technical words are required to create a covenant, and although even technical words of condition may be construed as a covenant, if such be the intention, yet as is said in Palmer *v.* Plankroad Co.:[36] "It is clear from the authorities that there may be a condition without a covenant; and that where the language imports a condition merely, and there are no words importing an agreement, it cannot be enforced as a covenant, but the only remedy is through a forfeiture of the estate. . . . It by no means follows that because a grantor consents to take an estate subject to a certain condition that he also consents to obligate himself personally for the performance of the condition. Many cases might be imagined where one would be willing to risk the forfeiture of the estate, while he would be altogether unwilling to incur the hazard of a personal responsibility."[37] And see Brown *v.* Chicago, etc., R. Co.,[38] where it is said: "Surely unless the terms of the deed were such that its acceptance imposed some obligation on the grantee to do or not to do, the clause cannot be said to be a covenant."

§ 10. CONDITION SUBSEQUENT DISTINGUISHED FROM A TRUST.—For the same reason that the law favors a covenant rather than a condition subsequent—its dislike of forfeitures—it prefers to construe words qualifying the ownership of lands as trusts rather than conditions.

In Stanley *v.* Colt,[39] a condition is thus distinguished from a trust: "A condition, if broken, forfeits the estate, and forever thereafter deprives the society [the devisee] of the gift; and not only this, but the heirs become seised of the first estate, and avoid, of course, all intermediate charges and encumbrances, and take also free and clear all the expenditures and improvements that may have been laid out on the property. On the

[36] 11 N. Y. 376, 389.

[37] Hale *v.* Finch, 104 U. S. 261, 269; Blanchard *v.* Detroit, &c., R. Co., 31 Mich. 43, 52; Close *v.* Burlington, &c., R. Co., 64 Ia. 150, 19 N. W. 186.

[38] 82 N. W. 1003.

[39] 5 Wall. 119, 165.

other hand, if these limitations are to be regarded as regulations to guide the trustees, and explanatory of the terms upon which the devise has been made, they create a trust which those who take the estate are bound to perform; and, in case of a breach, a court of equity will interpose and enforce performance." [40]

So strongly does the law favor a trust rather than a condition that even the technical words of condition may be denied their ordinary meaning, and, if such appears to be the intention, construed as trusts. Thus in Stanley *v.* Colt, *supra,* it is said: "It is true the word 'proviso' is an appropriate one to constitute a common law condition in a deed or will, but this is not the fixed and invariable meaning attached to it by the law in these instruments. On the contrary, it gives way to the intent of the parties as gathered from an examination of the whole instrument, and has frequently been thus explained and applied as expressing simply a covenant or limitation in trust."

In this case, a devise to an ecclesiastical society, "provided that said real estate be not ever hereafter sold or disposed of," etc., was held, in connection with the other provisions of the will, to be a gift in trust, and not on condition. And the same result was reached where the words were "upon this express condition" [41] "in trust nevertheless and on condition always" [42] "with this express limitation and condition." [43]

In Neely *v.* Hoskins,[44] land was conveyed "upon the condition that it shall be forever for the use of the Protestant Episcopal Church at Old Town," and this was held to be, not a condition for the benefit of the grantor, but a trust which equity would enforce at the instance and for the benefit of the parish. The court said: "It is not expressed in the deed that the estate shall be revertible for any cause, but it is contended that the idea is implied. The term 'condition' does not necessarily import it. 'Condition' may mean 'trust,' and 'trust' mean 'condi-

[40] Stuart *v.* Easton, 170 U. S. 383, 402.
[41] Wright *v.* Wilkin, 2 Best & Smith (110 E. C. L. R.) 232, 259.
[42] Sohier *v.* Trinity Church, 109 Mass. 1.
[43] Mills *v.* Davison, 54 N. J. Eq. 659, 35 L. R. A. 113.
[44] 84 Me. 386, 24 Atl. 882.

tion,' oftentimes. The construction must depend on the context and any admissible evidence outside of the deed." [45]

§ 11. VOID CONDITIONS; PRECEDENT OR SUBSEQUENT.—A condition may be void by reason of (1) impossibility, and (2) illegality.

As to the *effect* of a void condition, the law makes a sharp discrimination according as the condition is precedent or subsequent. If the void condition be precedent, the estate contingent thereon is also void, and the grantee shall take nothing by the grant; for an estate can neither commence nor increase on a void condition. On the other hand, if the void condition be subsequent, the condition only is void, and the estate already vested in the grantee is absolute and indefeasible. The general principle is thus stated by Riely, J., in Burdis *v.* Burdis: [46]

"The law is clear that where a condition precedent is annexed to a devise of real estate, and its performance is or becomes impossible, the devise fails, although there is no default or laches on the part of the devisee himself; but if the condition is subsequent, and its performance becomes impossible, the rule is different. In that case, the estate will not be defeated or forfeited, but the devisee will hold the property by an absolute title, as if no condition had been annexed to the devise." The law is the same as to a deed, and this whether the condition be void for impossibility, or for any other reason.[47]

§ 12. CONDITIONS VOID BECAUSE IMPOSSIBLE.—In this case the difference in effect between a condition precedent and subsequent is thus stated by Preston (*Estates,* p. 476): "It is necessary that the event should happen to give a title under this contingent or conditional limitation [*i. e.,* grant on a condition precedent]. Though the event on which the estate is to vest should

[45] Jones *v.* Habersham, 107 U. S. 174.

[46] 96 Va. 81.

[47] 2 Tho. Co. 18-21; Shepp. Touch. 132-3; 1 Prest. Est. 476; 2 Bl. Com. 156-7; 2 Min. Ins. (4th ed.) 279; 6 Am. & Eng. Ency. Law, 506; Vanhorne *v.* Dorrance, 2 Dall. (Pa.) 304, 317; Myers *v.* Daviess, 10 B. Mon. (Ky.) 394; Davis *v.* Gray, 16 Wall. 203, 229; note to Burdis *v.* Burdis (Va.), 70 Am. St. Rep. 829-837; Ellicott *v.* Ellicott, 90 Md. 321, 45 Atl. 183, 48 L. R. A. 58.

become impossible by the act of God, yet the gift would fail; while if a condition be annexed to an estate already vested [grant on condition subsequent], and the condition become impossible, the estate would be discharged from the condition, and become absolute."

When the condition is precedent, it matters not whether the impossibility exists at the time of the grant, or arises afterwards; or whether it exists in the nature of things, as a natural impossibility, or is caused by the act of God, by the law, or by the conduct of a third person. As to the parties to the grant, the grantee may be excused from the performance of a condition subsequent by the conduct of the grantor; but if the grantee should cause the impossibility of a condition subsequent imposed on him, he could not thus excuse its non-performance.[48] And it has been held that if the grantor who has imposed a condition precedent renders its performance unnecessary or impossible, this excuses it, and the estate in the land shall vest in the grantee without performance.[49]

For an example of a condition precedent whose performance was made impossible by the act of God, see Den *v.* Messenger.[50] Here the devise was as follows: "After the death or upon the marriage of my said wife, I do give, devise, and bequeath all the estate real and personal hereinbefore given to my said wife to Henry Clew, . . . upon the express condition that he, the said Henry Clew, do remain with me and my wife during our lives, and the life of the survivor of us, and continue to conduct himself in a proper manner." It was held that the condition was precedent; and as its performance by Henry Clew was made impossible by his death in the life-time of the widow, no estate vested in him, and the testator's heir took the land.[51]

The cases in which impossibility of performance of a condition subsequent has made the estate absolute in the grantee or devisee are numerous. See Nunnery *v.* Carter,[52] Parker *v.*

[48] 6 Am. & Eng. Ency. Law, 506.

[49] Jones *v.* Chesapeake, &c., R. Co., 14 W. Va. 514, 523. See, contra, 2 Min. Ins. 265, 279.

[50] 33 N. J. Law. 499.

[51] City of Stockton *v.* Weber, 98 Cal. 441, 33 Pac. 332.

[52] 5 Jones Eq. (N. C.) 370, 78 Am. Dec. 231.

Parker,[53] Burdis *v.* Burdis,[54] (condition subsequent of support by devisee of third person excused by death of such person in life-time of the testator;) Leonard *v.* Smith,[55] (condition subsequent of furnishing "pleasant home" made impossible by the conduct of the grantor himself); Bryant *v.* Dungan,[56] (condition subsequent of support, etc., of grandmother made impossible by her refusal to accept); Harrison *v.* Harrison,[57] (condition subsequent that one devisee "remain on place" made impossible by the cruelty of co-devisee); Davis *v.* Gray,[58] (impossibility due to war); Ricketts *v.* Louisville, &c., R. Co.[59] (alleged want of legal ability); Union Pac. R. Co. *v.* Cook,[60] (certain use of lot excused because lot washed away by river).

§ 13. CONDITIONS VOID BECAUSE UNLAWFUL.—When such a condition is precedent, no estate can vest in the grantor *without* performance, for this would ignore the condition; nor can it vest *by* performance, for such performance is against the law. When, however, the condition is subsequent, the condition is void, and the estate of the grantee absolute. As stated in 2 Tucker's Commentaries (93):

"The object of the principle is to remove all temptation to the illegal act. Thus in the case of a condition precedent, if I grant to a man that if he commits a murder he shall have a fee, the *estate granted* as well as the condition is void; and though the grantee should perform the condition by committing the murder, he could not demand the estate. Thus, then, the temptation to the sin is removed, because he cannot recover the wages of his iniquity, even if he does the deed. On the other hand, in case of a condition subsequent, if I give to A an estate in fee on condition that unless he kills B, the gift shall be void; here the estate being deemed absolute, and the condition only being void, the temptation to commit the crime is removed by *assuring the*

[53] 123 Mass. 584.
[54] 96 Va. 81.
[55] 80 Ia. 194, 45 N. W. 762.
[56] 92 Ky. 626, 36 Am. St. Rep. 618.
[57] 105 Ga. 517, 70 Am. St. Rep. 60.
[58] 16 Wall, 202-230.
[59] 91 Ky. 221, 34 Am. St. Rep. 176.
[60] 98 Fed. 281.

estate to the grantee whether he perform the condition or not; and at the same time the grantor loses what he had given with vicious intention, and fails in the attainment of his illegal purpose."

The above principles are so well settled that citation of authority is hardly necessary. They are recognized as to conditions precedent in Ransdell *v.* Boston,[61] where, however, the condition precedent (procurement of divorce in a *pending* suit) was held not illegal.

For examples of illegal conditions subsequent held to be void, and not to affect the estate already vested, see Board, &c. *v.* Young,[62] Scovill *v.* McMahon,[63] (condition subsequent, as to use of land for cemetery, made illegal by law forbidding further interment therein); Conrad *v.* Long,[64] (condition subsequent in a devise to a married woman that she shall not live with her husband); Maddox *v.* Maddox,[65] (bequest on condition subsequent of religious qualification). And see Trumbull *v.* Gibbons.[66]

§ 14. CONDITIONS IN RESTRAINT OF MARRIAGE.—For the law on this subject, see 2 Jarman on Wills (6th Am. ed. by Bigelow) (885), *et seq;* 2 Pom. Eq. (2nd ed.) § 933; note to Coppage *v.* Alexander;[67] note to Chapin *v.* Cooke,[68] note to Phillips *v.* Ferguson.[69]

Conditions in restraint of marriage may be valid or void; they may be precedent or subsequent; and they may be attached to gifts of realty or personalty. In the main, the doctrines already stated as to valid or void conditions are applicable to those in restraint of marriage; but there are notable diversities when such conditions are annexed to bequests of personalty. This, as has been often pointed out, is due to the influence of the civil law (by which legacies were governed), which declared all con-

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[61] 172 Ill. 439, 43 L. R. A. 526.
[62] 59 Fed. 96.
[63] 62 Conn. 378, 36 Am. St. Rep. 350, 21 L. R. A. 58.
[64] 33 Mich. 78.
[65] 11 Gratt. 804.
[66] 2 Zab. (N. J.) 117, 51 Am. Dec. 253.
[67] 38 Am. Dec. 156-161.
[68] 84 Am. St. Rep. 147-152.
[69] 1 L. R. A. 837.

ditions in restraint of marriage void; whereas by the common law such conditions are valid, unless the restraint imposed is total or unreasonable. In the language of Pomeroy: "The system which has been developed [as to legacies] is a partial compromise between the technical common law rules concerning conditions, and the doctrines of the Roman law which made void all attempts to restrict the perfect freedom of marriage; and, like most compromises, it has some incongruous features." 2 Pom. Eq., § 933. And see Scott *v.* Tyler;[70] Stackpole *v.* Beaumont;[71] Hogan *v.* Curtin.[72]

The departures in the law of legacies from the common-law rules as to conditions relate to the effect (1) of a condition precedent, void as in total or unreasonable restraint of marriage; and (2) of a condition subsequent, valid as in partial and reasonable restraint of marriage.

In the first case, as has been seen, it is the doctrine of the common law, that though a condition precedent be void, yet the estate is also void, and the grantee or devisee takes nothing. But in a bequest of personalty, though the condition precedent in restraint of marriage be void, the legacy is not void, and the bequest takes effect as if the condition had not been imposed. This is by the rule of the civil law which (in direct opposition to the common law) treats a void condition, even though precedent, as a nullity, and a gift so conditioned as absolute.[73]

The second departure referred to above is known as the doctrine of *in terrorem.* By the common law, a valid condition subsequent must be performed, or it is a ground of forfeiture; and it is immaterial whether there is a limitation over or not. But by the doctrine of *in terrorem,* as applied to bequests of personalty upon condition subsequent in restraint of marriage, though the restraint be partial and reasonable, yet the condition is inoperative, and the legacy already vested remains unaf-

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[70] 2 Bro. Ch. 432.

[71] 3 Ves. Jr. 89.

[72] 88 N. Y. 162.

[73] Maddox *v.* Maddox, 11 Gratt. 804; Phillips *v.* Ferguson, 85 Va. 509, 17 Am. St. Rep. 78; Hawke *v.* Euyart, 30 Neb. 149, 27 Am. St. Rep. 391; Ransdell *v.* Boston, 172 Ill. 439, 43 L. R. A. 526; note to Nunnery *v.* Carter (N. C.), 78 Am. Dec. 234-6.

fected by it, unless on the breach of the condition there is *a limitation over to a third person,* or a special direction that the forfeited legacy shall fall into the residuum.

When there is no limitation over, conditions subsequent in reasonable restraint of marriage, in a bequest of personalty, are called *in terrorem,* because, in the language of Lord Eldon, in Clarke *v.* Parker,[74] "they are supposed to alarm persons, when we [*i. e.* lawyers] know they contain no terror whatsoever." And see Hogan *v.* Curtin,[75] where Andrews, J., says of *in terrorem* that it is "merely a convenient phrase adopted by judges to stand in place of a reason for refusing to give effect to a valid condition." The doctrine, however, is well settled.[76]

§ 15. SUMMARY OF THE EFFECT OF CONDITIONS IN WILLS IN RESTRAINT OF MARRIAGE.

A. CONDITIONS PRECEDENT.

(1) *Real estate.*

(*a*) Restraint total or unreasonable. The condition is void; but being precedent, the estate is also void and cannot vest either with or without performance.

(*b*) Restraint partial and reasonable. The condition must be performed, or the estate can never vest.

(2) *Personal estate.*

(*a*) Restraint total or unreasonable. Then the condition only is void, and the gift is good.

(*b*) Restraint partial and reasonable. The condition is good and must be performed, or the gift cannot take effect.

B. CONDITIONS SUBSEQUENT.

(1) *Real estate.*

(*a*) Restraint total or unreasonable. The condition is void, and though not performed, the land is not liable to forfeiture.

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[74] 19 Ves. 1, 13.

[75] 88 N. Y. 162, 171.

[76] Coppage *v.* Alexander, 2 B. Mon. (Ky.) 313, 38 Am. Dec. 153; Hotz's Estate, 38 Pa. St. 422, 80 Am. Dec. 490; Randall *v.* Marble, 69 Me. 310, 31 Am. Rep. 281; Maddox *v.* Maddox, 11 Gratt. 804; Phillips *v.* Ferguson, 85 Va. 509; Fifield *v.* Van Wyck, 94 Va. 557, 64 Am. St. Rep. 745; Reuff *v.* Coleman, 30 W. Va. 171, 3 S. E. 597; Bennett *v.* Packer, 70 Conn. 357, 39 Atl. 739; Chapin *v.* Cooke, 73 Conn. 72, 84 Am. St. Rep. 189.

(*b*) Restraint partial and reasonable. The condition is good, and if broken the land is liable to forfeiture, whether there is a limitation over or not.

(2) *Personal estate.*

(*a*) Restraint total or unreasonable. The condition is void, and the gift is absolute.

(*b*) Restraint partial and reasonable. If there is a gift over, the condition is good, and if broken, the limitation over takes effect. But if there is no gift over, the condition is void, being considered *in terrorem* merely, and though broken, the gift is not divested. But this doctrine of *in terrorem* has no application to gifts of real estate, nor to conditions precedent as to personalty, nor to conditions subsequent as to personalty unless in partial and reasonable restraint.

N. B.—By way of exception to the general rule, a condition subsequent in a gift of property to a widow or widower totally restraining a second marriage is good.

§ 16. CONDITION SUBSEQUENT—HOW CREATED.—A condition subsequent, in order that its breach may operate to defeat the estate granted, must be expressed in the deed itself, or arise by necessary implication from its terms.[77] Extrinsic evidence of such a condition is inadmissible. Its reception would violate the rule which forbids parol contemporaneous evidence to contradict or vary the terms of a valid written instrument.[78]

As stated in 2 Devlin on Deeds:[79] "In an action to recover property conveyed by deed on the ground that a condition on which it was made has not been performed, the deed must speak for itself, and a condition cannot be grafted upon a deed absolute in form by parol evidence. The ingrafting of a contemporaneous condition on a deed will, in a proper action, be allowed only on clear evidence of fraud, accident, or mistake."[80]

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[77] 2 Washb. Real Prop. (4th ed.), 7; note to Cross *v.* Carson (Ind.), 44 Am. Dec. 744.

[78] Greenl. on Evid. (16th ed.), § 275; and § 305 c, by Wigmore.

[79] (2d ed.), § 976.

[80] Gadberry *v.* Sheppard, 27 Miss. 203; Rogers *v.* Sebastian, 21 Ark. 440; Thompson *v.* Thompson, 9 Ind. 323, 68 Am. Dec. 638; Long *v.* McConnell, 158 Pa. St. 573, 28 Atl. 233.

As an exception to the general rule above stated, it is the doctrine of equity that a deed absolute on its face may be shown by extrinsic evidence to be in reality a mortgage. 3 Pom. Eq. (2d ed.), § 1196. And though a deed of conveyance is silent as to a condition, this may be annexed thereto if contained in a bond or other written agreement, executed at the same time as the deed, and as a part of the same transaction.[81]

§ 17. CONDITION SUBSEQUENT—WHO IS LIABLE TO FORFEIT FOR ITS BREACH.—A condition subsequent enters into and qualifies the estate granted, and renders it defeasible not only in the hands of the original grantee or devisee, but in whosesoever hands it may come, by purchase or by descent. Hence it is binding on the heir or devisee of the receiver on condition, and also on his alienees. As is said in Sheppard's *Touchstone* (120): "And if he that hath the estate [on condition subsequent] grant or charge it, it will be subject to the condition still; for the condition doth always attend and wait upon the estate or thing whereunto it is annexed, so that although the same do pass through the hands of an hundred men, yet it is subject to the condition still; and although some of them be persons privileged in divers cases, as the king, infants, and women covert, yet they also are bound by the condition." [82]

In 2 Devlin on Deeds [83] it is said: "To bind the heirs or assigns to the performance of a condition subsequent, the condition must expressly mention them." But it is believed that this is not true as a general proposition, and that it is always a question of construction whether the condition was meant to concern the *grantee* alone, or to affect the *estate* in the land itself. In the latter case, the grantee's heir or assignee is bound, although not named in the deed. In the former, the death of the

[81] Richter *v.* Richter, 111 Ind. 456, 12 N. E. 698; Downing *v.* Rademacher, 133 Cal. 220, 85 Am. St. Rep. 160; Miller *v.* Quick, 158 Mo. 495, 59 S. W. 955.

[82] 44 Am. Dec. 745, note; Jackson *v.* Topping, 1 Wend. (N. Y.), 388, 19 Am. Dec. 515; Verplanck *v.* Wright, 23 Wend. 506; Hogeboom *v.* Hall, 24 Wend. 146; Taylor *v.* Sutton, 15 Ga. 103, 60 Am. Dec. 682; Sioux City, &c., R. Co. *v.* Singer, 49 Minn. 301, 32 Am. St. Rep. 554; Ruddick *v.* St. Louis, &c., R. Co., 116 Mo. 25, 38 Am. St. Rep. 570.

[83] 2d ed., § 970.

grantee, or his alienation, discharges the condition, and the heir or alienee takes the estate free from condition. Thus a condition in a lease that certain land "shall not be cleared, nor any timber cut therefrom," not saying by whom, is a condition attached to and operating upon the estate, and not merely personal, and passes with the estate to an assignee, though he be not named. Verplanck *v.* Wright.[84] But this condition in a deed, if the said George Simpson [the grantee] shall neglect to keep up at his own expense, forever, a good and lawful fence," etc., is personal, and binds George Simpson alone.[85]

In Odessa Improvement, &c., Co. *v.* Dawson,[86] it was held that a condition in a deed prohibiting the use of land for the manufacture or sale of intoxicating liquors is binding into whosesoever hands the land may thereafter come; and that the grantor may enforce a forfeiture for the breach of the condition against a purchaser from the grantee, though the condition did not in express terms purport to bind the heirs and assigns of the grantee. The court said: "That the law applies the rule of strict construction when forfeiture is claimed for the breach of a condition subsequent, there can be no question. And upon this ground it has been very generally laid down by text writers that 'where a condition applies in terms to the grantee, without mentioning assigns, they will not be included.' To sustain this view, the cases of Emerson *v.* Simpson,[87] and Page *v.* Palmer,[88] are invariably cited. These cases are no doubt authority for the proposition that where the deed in terms exacts the doing of something by the grantee by name, and does not make the same requirement of his heirs or assigns, a forfeiture will not be decreed for their failure; and hence it will be noted that the text writers in stating the principle, apply it to cases where the 'condition in terms applies to the grantee.' In this case it will be noted that the condition in the deed does not in terms apply to the grantee in stating the prohibition, but applies to the lot itself.

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[84] 23 Wend. 506.

[85] Emerson *v.* Simpson, 43 N. H. 475, 82 Am. Dec. 168; 44 Am. Dec. 745, note; 2 Washburn, Real Prop. (5th ed.), p. 447.

[86] 5 Texas Civ. App. 487, 24 S. W. 576.

[87] 43 N. H. 475.

[88] 48 N. H. 385.

The language is, 'the property hereinafter described shall not be used,'" etc.[89]

§ 18. BREACH OF CONDITION SUBSEQUENT—WHO MAY ENFORCE FORFEITURE THEREFOR.—"It is of the essence of an estate on condition that the right to enter for breach of the condition be reserved to the grantor and his heirs. It cannot be reserved to strangers." *Per* Bigelow, J., in Guild *v.* Richards.[90] And further it is the doctrine of the common law that a forfeiture for a breach of the condition can only be *enforced* by the grantor or his heirs. It cannot be enforced by the grantor's assignee or devisee. "All that remains in the grantor of an estate [in fee] on condition is a right of entry for breach, which is sometimes called a possibility of reverter. This right or possibility, although it may be released to the person holding the conditional estate, so as to vest the absolute title in him, cannot be conveyed to a stranger or third person. A mere right of entry could not be conveyed at common law. It would be contrary to the ancient, well-settled rule that 'nothing in action, entry, or reëntry can be granted over.' Co. Litt. 214 *a.*"

In an oft-quoted passage in Sheppard's *Touchstone* (p. 149), the law is thus laid down: "It is a rule of the common law that none may take advantage of a condition but parties and privies in right and representation, as heirs of natural persons, executors, etc., and the successors of politic persons; and that neither privies nor assignees in law, as lords by escheat; nor in deed, as grantees of reversions; nor privies in estate, as he to whom a remainder is limited, shall take benefit of entry or reëntry by force of a condition." And in Ruch *v.* Rock Island,[91] it is said: "If the conditions subsequent were broken, that did not *ipso facto* produce a reverter of the title. The estate continued in full force until the proper steps were taken to consummate the forfeiture. This could be done only by the grantor in his life-time, and after his death by those in privity of blood with him. In the meantime, only a right of action subsisted, and

[89] Sioux City, &c., R. Co. *v.* Singer, 49 Minn. 301, 32 Am. St. Rep. 554; Upington *v.* Corrigan, 151 N. Y. 143, 154, 37 L. R. A. 794.

[90] 16 Gray (Mass.), 308, 317. [91] 97 U. S. 693, 696.

that could not be conveyed so as to vest the right to sue in a stranger." [92]

It will be seen by the above extract from the *Touchstone* that the doctrine of the common law, which forbade a stranger to meddle with conditions, and confined them, as to reservation and enforcement, to the grantor and his privies in blood, was applied (1) to all assignments by the grantor, and this whether a reversion remained in him or not, and (2) to a limitation over, after the breach of a condition subsequent by the first taker, in favor of a third person. As to the limitation over, such a limitation was void at common law, but is permitted in a devise, or in a deed by way of use, under the name of a conditional limitation. And such a limitation is now good in Virginia under the statute of grants.

As to assignments by the grantor, a distinction must now be made between a grantor on a condition subsequent in whom there remains a reversion after a term of years or an estate for life, and a grantor who has parted with his entire interest, and in whom there remains nothing but the right of entry, or of action, for the breach of the condition. In the former case, by statute of 32 Hen. VIII, c. 34, assignees of reversions expectant on particular estates "for term of life or lives, or for term of years," were allowed to take advantage of conditions broken; but in other cases, the interest of a grantor in fee on breach of a condition subsequent by the grantee, which is a mere possibility of reverter, remained non-assignable as at common law.[93]

For the Virginia statute based on that of 32 Henry VIII.,

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[92] Schulenberg *v.* Harriman, 21 Wall. 44, 63; Jackson *v.* Topping, 1 Wend. (N. Y.), 388, 19 Am. Dec. 515; Craig *v.* Wells, 11 N. Y. 315; Nicoll *v.* New York, &c., R. Co., 12 N. Y. 121; Underhill *v.* Saratoga, &c., R. Co., 20 Barb. (N. Y.) 455; Guild *v.* Richards, 16 Gray (Mass.) 309; Bangor *v.* Warren, 34 Me. 324, 56 Am. Dec. 657; Southard *v.* Central, &c., R. Co., 26 N. J. Law, 13; Bouvier *v.* Baltimore, &c., R. Co. (N. J.), 47 Atl. 772; Higbee *v.* Rodeman, 129 Ind. 244, 28 N. E. 442; Fowlkes *v.* Wagoner (Tenn.), 46 S. W. 586, 591; Kellam *v.* Kellam, 2 Patt. & H. (Va.), 357; note to Cross *v.* Carson (Ind.), 44 Am. Dec. 758.

[93] For discussion of the statute of Henry VIII., see Shepp. Touch. 150; Williams, Real Prop. (17th ed.), 391; Nicoll *v.* New York, &c., R. Co., 12 N. Y. 121, 131; Van Rensselaer *v.* Ball, 19 N. Y. 100; note to Dumpor's Case, 1 Sm. L. C. (7th ed.) 110.

see C. V. § 2781. It is as follows: "A grantee or assignee of any land let to lease, or of the reversion thereof, and his personal representative or assigns, shall enjoy against the lessee, his heirs, personal representative or assigns, the like advantage by action or entry for any forfeiture . . . which the grantor, assignor, or lessor, or his heirs might have enjoyed."

But though the statute of Henry VIII. does not apply to the assignment of a bare right of entry for breach of a condition subsequent, there are more recent English statutes which enable the assignee of such right to enforce it, and this whether he claims under the grantor by deed or by devise. As to a devisee, the Wills Act of 1 Victoria (1 Vict. c. 26, § 3) makes devisable "all rights of entry for condition broken, and other rights of entry." [94] As to an assignee, the statute of 8 and 9 Vict. c. 106, § 6 declares that "a right of entry, whether immediate or future, and whether vested or contingent, may be disposed of by deed." And there are statutes on the subject in several of our States.[95]

§ 19. CONDITION SUBSEQUENT—MODE OF ENFORCEMENT OF FORFEITURE FOR BREACH.—Assuming that there has been a breach of a valid condition subsequent, the estate vested in the grantee does not cease in him, and revest in the grantor *ipso facto,* but remains unimpaired in the grantee until entry, or its equivalent, by the grantor or his heirs. For the grantor or his heirs may waive the right to enforce the forfeiture; and though there has been no express waiver, and the estate of the grantee is still liable to forfeiture, the law, in favor of the vested estate, will not permit its destruction until the right to forfeit has been exercised.[96]

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[94] 1 Jarman, Wills, Bigelow's ed., p. 75; 2 Id, App. B, p. 798.

[95] Southard *v.* Central R. Co., 26 N. J. Law, 13; Cornelius *v.* Ivins, Ib. 376; Bouvier *v.* Baltimore, &c., R. Co. (N. J.), 47 Atl. 772; Methodist, &c., Church *v.* Henderson, 40 S. E. (N. C.), 691. The law of Virginia is not decided. See Va. Code, § 2418; King *v.* Norfolk, &c., R. Co., 99 Va. 625; Shreve *v.* Norfolk, &c., R. Co., 109 Va. 706.

[96] Note to Cross *v.* Carson (Ind.), 44 Am. Dec. 754; Chalker *v.* Chalker, 1 Conn. 79, 6 Am. Dec. 206; Spear *v.* Fuller, 8 N. H. 174, 28 Am. Dec. 391; Thompson *v.* Thompson, 9 Ind. 323, 68 Am. Dec. 638; O'Brien *v.* Wagner, 94 Mo. 93, 4 Am. St. Rep. 362; Preston *v.* Bos-

As to the mode of exercise of the right to enforce a forfeiture, the common law required in order to divest an estate of freehold (unless the grantor was already in possession at the time of the breach) an entry on the land, in order that the estate, which had vested by entry and livery of seisin, should be divested by the equal notoriety of entry and the resumption of that seisin.[97] But in modern practice, the forfeiture is usually enforced by the action of ejectment; and in order to bring this action no actual entry is required at common law, and it is dispensed with by the provisions of the statutory action.[98]

The language of the Virginia statute dispensing with entry in order to enforce a breach of a condition subsequent, and authorizing an action of ejectment in lieu thereof, is as follows: "Any person who shall have a right of reëntry into lands by reason of any rent issuing thereout being in arrear, or by reason of the breach of any covenant or condition, may serve a declaration in ejectment on the tenant in possession, where there shall be such tenant, or if the possession be vacant, by affixing the declaration upon the chief door of any messuage, or at any other notorious place on the premises, which service shall be in lieu of a demand and reëntry; and upon proof to the court by affidavit in case of judgment by default, or upon proof on the trial, that the rent claimed was due, and no sufficient distress was upon the premises, or that the covenant or condition was broken before the service of the declaration, and

worth, 153 Ind. 458, 74 Am. St. Rep. 313; Hubbard *v.* Hubbard, 97 Mass. 188; Langley *v.* Chapin, 134 Mass. 82; Schulenberg *v.* Harriman, 21 Wall. 44; Little Falls, &c., Co. *v.* Belin, 69 Minn. 253, 72 N. W. 69; Bonniwell *v.* Madison, 107 Ia. 85, 77 N. W. 530; Robinson *v.* Ingram, N. C. 35 S. E. 612; Houston, &c., R. Co. *v.* Compress Co. (Tex. Civ. App.), 56 S. W. 367; Lewis *v.* Lewis (Conn.), 51 Atl. 854.

[97] 2 Min. Ins. (4th ed.) 267; note to Cross *v.* Carson (Ind.), 44 Am. Dec. 755.

[98] Ruch *v.* Rock Island, 97 U. S. 693; Cowell *v.* Springs Co., 100 U. S. 55; Plumb *v.* Tubbs, 41 N. Y. 442; Cornelius *v.* Ivins, 26 N. J. Law, 376; Bouvier *v.* Baltimore, &c., R. Co. (N. J.), 47 Atl. 772; Ritchie *v.* Kansas, &c., R. Co., 55 Kansas, 36, 39 Pac. 718; Sioux City, &c., R. Co. *v.* Singer, 49 Minn. 301, 32 Am. St. Rep. 554; Ruddick *v.* St. Louis, &c., R. Co., 116 Mo. 25, 38 Am. St. Rep. 570; Johnston *v.* Hargrove, 80 Va. 118; Bowyer *v.* Seymour, 13 W. Va. 12; Martin *v.* Ohio R. Co., 37 W. Va. 349, 16 S. E. 589.

that the plaintiff had power thereupon to reënter, he shall recover judgment, and have execution for such lands." [99]

§20. BREACH OF CONDITION SUBSEQUENT — WAIVER OF FORFEITURE.—This subject has already been referred to incidentally (§§ 5, 6, *supra*), and it has been seen that, since the mere breach of a condition subsequent does not of itself cause forfeiture, the grantor may waive the enforcement of the right to forfeit; and, when this is once done, the title of the grantee notwithstanding his breach of the condition, is no longer forfeitable therefor. Thus in Preston *v.* Bosworth,[1] it is held that a complaint in an action to recover an estate claimed to have been forfeited for breach of a condition subsequent by a grantee in possession is demurrable when it alleges only the *breach* of the condition, but does not state that any steps were taken to enforce the forfeiture. The court says: "A breach of the condition subsequent is pleaded. But a breach does not complete a forfeiture. A breach may be waived, and is not, therefore, self-operative to divest the grantee's title. If not waived, a breach may be made the occasion of reëntry and enforcement of forfeiture. A complaint must exhibit a complete right of action." [2]

With reference to the *mode* of waiver, it is said in Sharon Iron Co. *v.* City of Erie: [3] "The doctrine that a forfeiture may be waived by the party who has the right to avail himself of the breach of a condition, and that he may do this by acts as well as by express agreement, is a familiar one." Indeed, the law favors the waiver of a forfeiture; and such waiver is readily implied from any conduct on the part of the grantor on condition inconsistent with an intention to enforce a forfeiture for its breach, and especially when his acts, whether of commission or omission, are such as to bring him within the doctrine of estoppel.[4]

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[99] C. V. § 2796. See 2 Tayl. L. and T. §§ 493-4.

[1] 153 Ind. 458, 74 Am. St. Rep. 313.

[2] For a discussion of waiver of forfeiture, see note to Cross *v.* Carson (Ind.), 44 Am. Dec. 746; 1 Pom. Eq. § 451, n. 1; note to Dumpor's Case, 1 Smith, Lead. Cas. (7th ed.) 95; Taylor, L. & T. § 497

[3] 41 Pa. St. 341, 351.

[4] Garnhart *v.* Finney, 40 Mo. 449, 93 Am. Dec. 303.

As to active conduct which amounts to a waiver of the breach of the condition, the most frequent example is where a lease contains a clause of reëntry for breach of a condition subsequent, and the landlord, knowing that liability to the forfeiture has been incurred (see Silva *v.* Campbell, 84 Cal. 420, 24 Pac. 316), accepts rent as such which has fallen due since the breach of the condition. Thus in McKildoe *v.* Darracott, 13 Grat. 278, a lease was made on condition that the lessor should have right of reëntry if the lessee should underlet the property without the license of the lessor; and the lessor's conduct, with knowledge of a sublease without license, was held to amount to a waiver. The court said: "Each and all of these acts, to-wit: the demand of the rent [of the lessee], the distress for it, the acceptance of it, and the express declaration made at the time of its payment, were plain and palpable affirmations and recognitions of the existing tenancy of R. F. Darracott [the lessee]. Why, then, are they not a waiver of the forfeiture?"

A similar doctrine is laid down in Dougal *v.* Fryer,[5] (waiver of breach of condition, that a deed should be void unless purchase-money be paid by a certain time, by the grantor's accepting payment after that time); and in Dunklee *v.* Hooper,[6] (waiver of breach of condition of support by the grantor's return and acceptance of support after having left the premises for eleven weeks for non-support).[7]

As to passive conduct which operates by estoppel as a waiver of a breach of a condition subsequent, see Ludlow *v.* New York, &c., R. Co.,[8] where a grant of land in fee was made to a railroad company on condition subsequent that a railroad should be completed through the land granted by a certain time. This condition was broken. But after the time had elapsed, the

[5] 3 Mo. 40, 22 Am. Dec. 458.

[6] 69 Vt. 65, 37 Atl. 225.

[7] And see Deaton *v.* Taylor, 90 Va. 219; Ireland *v.* Nichols, 46 N. Y. 413; Murray *v.* Harway, 56 N. Y. 337; Chippewa Lumber Co. *v.* Tremper, 75 Mich. 36, 13 Am. St. Rep. 420; Jenks *v.* Palowski, 98 Mich. 110, 39 Am. St. Rep. 522; Moses *v.* Loomis, 156 Ill. 392, 47 Am. St. Rep. 194, and note, p. 197; Bonniwell *v.* Madison, 107 Ia. 85, 77 N. W. 530; Alexander *v.* Alexander, 156 Mo. 413, 57 S. W. 110.

[8] 12 Barb. (N. Y.) 440.

grantor, with knowledge of the breach, permitted the company to go on and incur expense in constructing the road, making no objection; and this was held a waiver of the forfeiture. Another example of a similar character is found in Scovill *v.* Mcmahon,[9] where it is said: "The alleged right to enter for failure to maintain a fence [around a burying ground] accrued about forty-five years ago, as the record shows that the grantees have never built a fence around the premises. During this period of forty-five years there has apparently been no demand made, either by the grantor or his heirs, for the erection of a fence. During this period the grantor and his heirs have silently permitted interments to be made, and monuments to be erected, until this tract was filled with graves. . . . If the clause in question were to be construed as creating a condition subsequent, we think upon these facts the plaintiffs may be justly held either to have waived their right, or to have lost it by their own laches."[10]

It is said, however, in Gray *v.* Blanchard,[11] that "a mere indulgence is never to be construed into a waiver of a breach of condition." And in Royal *v.* The Aultman Taylor Co.,[12] the law is thus stated: "While a condition may be waived by the party who has a right to avail himself of it, mere indulgence, or silent acquiescence in the failure to perform, is never construed into a waiver unless some element of estoppel can be invoked."[13] While this may be true of "mere indulgence" for a time short of the time prescribed as a bar to an entry by the statute of limitations (see in Virginia Code, § 2915), yet it is believed that the case would be rare in which a failure to exercise the right to enforce forfeiture for a considerable period would not be accompanied by such conduct on the part of the grantor on condition (at least when the grantee is in posses-

[9] 62 Conn. 378, 36 Am. St. Rep. 350.

[10] Kenner *v.* American Contract Co., 9 Bush. (Ky.), 202; Grigg *v.* Landis, 21 N. J. Eq. 449; Barrie *v.* Smith, 47 Mich. 130, 10 N. W. 168.

[11] 8 Pick. (Mass.) 290.

[12] 116 Ind. 424 (2 L. R. A. 526).

[13] And see to the same effect McKildoe *v.* Darracott; 13 Gratt. 278, 282; note to Cross *v.* Carson (Ind.), 44 Am. Dec. 246; 6 Am. & Eng. Ency. Law (2d ed.), 508, and note; Perry *v.* Davis, 3 C. B. (N. S.), 769.

sion) as to bring him within the operation of the doctrine of laches and estoppel, and so amount to a waiver of the breach.[14]

§ 21. DISCHARGE OF CONDITION SUBSEQUENT—DOCTRINE OF DUMPOR'S CASE.—Under discharge of a condition subsequent must be considered the modes in which an estate on such condition may become absolute and unconditional, the condition itself being forever extinguished and destroyed. This may occur by waiver after breach when the condition imposes a single obligation, whose breach cannot be continuing or recurrent. In this case the condition itself is discharged by the lessor's waiver; though it is otherwise when the condition is continuous. Or a condition may be discharged before breach, and this either by the intention of the parties, or by conduct of the grantor which the law pronounces an extinguishment of the condition, though no such result was intended.

Under the first head—condition extinguished by intention—comes the *performance* of a condition, as when an affirmative condition is duly satisfied by the payment of money or the doing of some collateral act. So a negative condition may cease to be operative by the grantee's refraining from doing the forbidden act during the period prescribed. The effect of such performance is thus stated by Blackstone:[15] "When any condition is performed, it is thenceforth entirely gone; and the thing to which it was before annexed becomes absolute and wholly unconditional."[16] Under this head also comes release of a condition. Of this it is said in 1 Sheppard's *Touchstone* (158): "If the feoffor or lessor release to the feoffee or lessee all conditions, or all demands in the land, or confirm the estate of the feoffee without condition, etc., by either of these means the condition is destroyed and gone forever."[17]

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[14] See Jones *v.* McLain, 16 Texas Civ. App. 305, 41 S. W. 714.

[15] 2 Com. 110.

[16] See 2 Tho. Co. (60), n. (O. 1); note to Cross *v.* Carson (Ind.), 44 Am. Dec. 748.

[17] See as to release of a condition, Brattle Square Church *v.* Grant, 3 Gray (Mass.), 142, 148; Jewell *v.* Lee, 14 Allen (Mass.) 145, 92 Am. Dec. 744; note to Cross *v.* Carson (Ind.), 44 Am. Dec. 746. As to who

Under the second head—condition discharged by the conduct of the grantor, irrespective of his intention—comes the doctrine of Dumpor's Case,[18] decided in the King's Bench in 1603. It was there resolved that if the lessor of land, on condition subsequent that he may reënter if the lessee *or his assigns* shall assign the term without the license of the lessor, once gives such license to the lessee, who assigns accordingly, the condition is thereby discharged; and the assignee takes the term absolute and unconditioned, so that such assignee, or any subsequent assignee, may assign it without license, just as if no condition to the contrary had ever been imposed. In Dumpor's Case the license to the lessee was to assign to anybody he pleased ("to any person or persons *quibuscumque*"); but in Brummell *v.* McPherson,[19] (decided in 1807), Lord Eldon applied the doctrine of Dumpor's Case, and denied the lessor's right of reëntry when the assignee had assigned without license, although the lessor's license to the lessee was to assign to the assignee only, and not to whomsoever the lessee pleased.

The question in Dumpor's Case is stated in Cro. Eliz. 815 (where the case is reported under the name of Dumper *v.* Syms) as follows: "Whether this license to the first lessee to alien (who aliened accordingly) be a dispensation only [*i. e., pro hac vice*], or a total determination of the condition. And as to that point Gawdy, Clinch, and Popham delivered their opinion severally that the condition was gone and discharged by the dispensation to alien [given] to the lessee himself; for the condition, being once dispensed with, it is utterly determined. For it cannot be discharged for a time, and be *in esse* again afterwards."

In 4 Co. 120, the reasons for the discharge of the condition by the license to the lessee are thus stated: "And although the proviso be that the lessee *or his assigns* shall not alien, yet when the lessors license the lessee to alien, they shall never defeat by force of the said proviso the term which is absolutely

is entitled to release a condition, see Tanner *v.* Bibber, 2 Duvall (Ky.), 550; Hopkins *v.* Smith, 162 Mass. 444; Safe Deposit, &c., Co. *v.* Flaherty, 91 Md. 489, 46 Atl. 1009.

[18] 4 Co. 119.

[19] 14 Ves. 173.

aliened by their license, inasmuch as the assignee has the same term which was assigned by their assent; so that if the lessors dispense with one alienation, they thereby dispense with all alienations after; for inasmuch as by force of the lessors' license, and the lessee's assignment, the estate and interest of Tubbe [the assignee] was absolute, it is not possible that *his* assignee, who has his estate and interest, shall be subject to the first condition; and as the dispensation of one alienation is the dispensation of all others, so it is as to the persons, for if the lessors dispense with one, all others are at liberty."

From the above reasons, taken from the two reports of Dumpor's Case, it is manifest that the decision proceeded on the ground of the *entirety* of a condition, both as to time and persons, in the sense that it must have uninterrupted operation, any impairment of its integrity by licensed dispensation being fatal to its existence. Thus in Croke it is said: "It cannot be discharged [*i. e.,* dispensed with] for a time, and be *in esse* again afterwards." And Coke says: "So it is as to the persons; for if the lessors dispense with one [*i. e.,* allow the lessee to assign] all others are at liberty." And he insists that if, by the lessors' license to the lessee to assign, the term once becomes free from the condition, it must forever remain so, and that the condition can never again attach to the term, into whosesoever hands it may come. And in both reports, precedents are relied on which declare that a condition subsequent is indivisible and incapable of apportionment, as if this doctrine tended to sustain the decision of the court.

The resolution in Dumpor's Case may therefore be said to rest on two foundations, viz., (1) the doctrine of the entirety of a condition, and (2) the doctrine of its non-susceptibility to apportionment. But it is manifest that where, as in Dumpor's Case, the condition is only not to assign *without* license, to assign *with* license does not dispense with the condition; but, in pursuing the exception, preserves its integrity; and, further, that the doctrine of non-apportionment is misapplied, as this has reference to a severance of ownership of the reversion, or to a discharge of part of the estate demised. In the language of

Williams (Real Prop. 570): "The ground of this doctrine [that laid down in Dumpor's Case] was that every condition of reëntry was entire and indivisible; and the condition had been waived [licensed] once, it could not be enforced again. . . . ; but its application to a license to perform an act which was only prohibited when done *without* license, was not very apparent."

In Brummell *v.* McPherson,[20] Lord Eldon (as has been stated in § 21, *supra*) followed the doctrine of Dumpor's Case, saying: "Though Dumpor's Case always struck me as extraordinary, it is the law of the land at this day." But although Lord Eldon did not feel at liberty to depart from the doctrine of Dumpor's Case, he thus expressed his dissatisfaction with the doctrine laid down therein as to the effect of the lessors' license: "When a man demises to A, his executors, administrators, or *assigns,* with an agreement that if he, his executors, administrators, or assigns, assign without license, the lessor shall be at liberty to reënter, it would have been perfectly reasonable originally to say that a license [*i. e.,* to the lessee] was not a dispensation with the condition [*i. e.,* as to assigns], the assignee being, by the very terms of the original contract, restrained, as well as the original lessee." And in Doe *v.* Bliss,[21] (decided in 1813), Mansfield, C. J., says: "Certainly the profession have always wondered at Dumpor's Case; but it has been law for so many centuries that we cannot now reverse it."

While the English judges—because of the respect due to age —declined to overrule Dumpor's Case, its practical inconvenience to tenants was severely felt. For, as is said by Williams (Real Prop. 571): "No landlord could venture to give a license to do any act which might be prohibited by the lease unless done with license, for fear of losing the benefit of the proviso for reëntry in case of any future breach of covenant." But relief was at last given, in 1859, by Lord St. Leonards' Act (22 & 23 Vict. c. 35, §§ 1, 2), which enacts, in substance, that after license to do any act which by the condition in a lease

[20] 14 Ves. 172.

[21] 4 Taunt. 735.

would create a forfeiture or give a right to reënter if done without license, such license shall extend only to the permission actually given; and the condition or right of reëntry shall be and remain in all respects as if such license had not been given, except in respect of the particular matter authorized to be done." [22]

§ 22. DUMPOR'S CASE IN THE UNITED STATES.—For a review of the American authorities up to 1873, see an article entitled "Dumpor's Case," 7 *American Law Review,* 616. The conclusion reached by the author as to the status of the doctrine of Dumpor's Case in the United States is that "with a single and somewhat doubtful exception, there has been no decision directly in point, and the rule has been recognized only to be distinguished." So in 12 *Harvard Law Review,* 272 (Nov., 1897), it is said in an editorial note that "the extent to which the rule prevails in the United States is uncertain. Almost always it is held inapplicable." And in the article in 7 *Am. Law Review,* at page 634, it is declared: "In no case has it [the doctrine of Dumpor's Case] been examined and approved on its intrinsic soundness."

On the other hand, it must be observed that, so far at least as the writer's research has extended, not only does the rule in Dumpor's Case remain unchanged by statute in the United States, but it has never been repudiated by any American decision. It is true that the disparaging remarks concerning it of Lord Eldon and Sir James Mansfield are sometimes referred to by American judges; and similar language of disapproval of their own is not wanting, as when Chancellor Walworth, in Williams *v.* Dakin,[23] speaks of Dumpor's Case as "carrying a technical principle beyond the bounds of common sense." But the rule itself is nowhere denied in the United States, but is recognized as having been "law for so many centuries" that it is now the "law of the land." [24]

[22] See Williams, Real Prop. 571; 1 Washb. Real Prop. (317); note to Dumpor's Case, 1 Smith Lead. Cas. 95. 96, where the statute is set out at length.

[23] 22 Wend. (N. Y.), 201, 209.

[24] Bleecker *v.* Smith, 13 Wend. (N. Y.), 530, 533; Dakin *v.* Williams,

Indeed, not only has the doctrine of Dumpor's Case not been repudiated by the American courts, but it has sometimes been carried beyond the facts in that case, and has been deemed to apply to a covenant as well as to a condition Reid *v.* Weissner, &c., Brewing Co.,[25] and even to the implied waiver of the breach of a condition from the acceptance of rent.[26]

That the better doctrine is that the rule in Dumpor's Case does not extend to a *covenant* not to assign, see Twynam *v.* Pickard;[27] Paul *v.* Nurse;[28] Williams *v.* Dakin;[29] Garnett *v.* Albree;[30] 1 Smith L. C. 103; 1 Tayl. L. & T. § 410, n. 3; 7 Am. Law Review, 634-7; 12 Harv. Law Review, 273.

Upon the question whether the rule in Dumpor's Case extends to an implied waiver by the acceptance of rent after breach of a condition not to assign, there is conflict. In 1 Washb. Real Prop. 503, it is said: "A mere waiver by acquiescence, without any actual license, as, for instance, by taking rent of an assignee, where the original tenant had been restrained from assigning by a condition in his lease, though it would ratify such an assignment, would not extend to future breaches of the same kind, so as to prevent the lessor's entering and defeating the demise for a new assignment made." On the other hand, in 1 Taylor, L. & T. § 411, it is said: "The acceptance of rent by a landlord after breach of a condition not to assign is tantamount to a license." If this be true, the rule in Dumpor's Case of course applies, and the landlord who has received rent from the first assignee loses thereby not only

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17 Wend. 447, 457; Williams *v.* Dakin, 22 Wend. 201, 209; Lynde *v.* Hough, 27 Barb. 415, 422; Murray *v.* Harway, 56 N. Y. 337; Gannett *v.* Albree, 103 Mass. 372; Pennock *v.* Lyons, 118 Mass. 92; Dickey *v.* McCullough, 2 W. & S. (Pa.) 88; Sharon Iron Co. *v.* City of Erie, 41 Pa. St. 341; McKildoe *v.* Darracott, 13 Gratt. (Va.) 278; Tenn. etc., Co. *v.* Scott, 14 Mo. 46; Chipman *v.* Emeric, 5 Cal. 49; Reid *v.* Weissner, &c., Brewing Co., 88 Md. 234, 40 Atl. 877. See American note to Dumpor's Case, 1 Sm. Lead. Cas. 103; note to Cross *v.* Carson (Ind.), 44 Am. Dec. 748; 1 Washb. Real Prop. (5th ed.), 503, and notes; 2 Id. 21; 1 Taylor, L. & T., § 286; also § 410, and note 3.

[25] 88 Md. 234, 40 Atl. 887.

[26] Murray *v.* Harway, 56 N. Y. 337.

[27] 2 B. & Ald. 105.

[28] 8 B. & C. 486.

[29] 22 Wend. 201, 209.

[30] 103 Mass. 372.

the right to enter for the first assignment, but also the right to enter for a second. See as to these conflicting views, 7 Am. Law Review, 633, where the above statement of the law by Washburn is approved.

It may be added that it has been held in Missouri that the doctrine of Dumpor's Case—that a condition once dispensed with is gone forever—is confined to grants of land, and does not extend to personal contracts. Thus a condition in a policy of insurance that the assured should obtain the assent of the company to a change of ownership of the insured property was held not to be discharged (but only dispensed with *pro hac vice*) by the assent of the company to one change of ownership, and to become again operative on a subsequent change without such assent.[31] But see Sharon Iron Works *v.* City of Erie,[32] where it is said: "Whether the rule in Dumpor's Case, as said in two Missouri cases, 'under which conditions once waived are wholly gone,' is restricted to grants of lands and incorporeal hereditaments, and forms no part of the general law of contracts, I shall not stop to consider, for the case before us is that of a condition annexed to a grant of land in fee-simple, expressly dispensed with and waived by the grantors."

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[31] Tenn., &c., Co. *v.* Scott, 14 Mo. 46; Eddy *v.* Ins. Co., 21 Mo. 587; 1 Smith Lead. Cas. 104; 7 Am. Law Review, 634.

[32] 41 Pa. St. 341, 352.